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IN BOUND VOLUMES

PMMc
Union City, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BLOMMER CHOCOLATE COMPANY OF CALIFORNIA, LLC

and Case 32-RC-131048

BAKERS UNION LOCAL 125, BAKERY,
CONFECTIONERY, TOBACCO WORKERS AND
GRAIN MILLERS INTERNATIONAL UNION

DECISION AND DIRECTION OF SECOND ELECTION

The National Labor Relations Board, by a three-member panel, has considered objections to an election held July 29 and 30, 2014, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 18 for and 50 against the Petitioner, with 6 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations as modified below, and finds that the election must be set aside and a new election held.

The hearing officer ordered a second election because he found that the Employer engaged in objectionable conduct by maintaining three overbroad work rules: (1) a confidentiality rule that prohibits employees from disclosing employee lists; (2) a computer use rule that allows employees to use their work computers for personal uses, but prohibits them

from expressing personal opinions; and (3) a prohibition on employee use of the company name and logo. We agree that these rules are overbroad for the reasons articulated by the hearing officer, and that they interfered with the election and warrant a second election for the reasons stated in the hearing officer's report.[1]

[1] We find the computer usage rule overly broad only as it applies to employees' use of the Employer's email system. See *Purple Communications, Inc.*, 361 NLRB No. 126 (2014). Our dissenting colleague argues that the record is insufficient to establish that employees have access to the company's email system. On the contrary, the Employer's handbook makes clear that the Employer's computer system, phone system, *and email*, although implemented for business purposes, are available to employees for occasional personal use. In addition, the Employer stipulated that employees are granted internet access. From these circumstances we reasonably may infer that employees in fact do have access to the Employer's email system.

We agree with the hearing officer that the prohibition on employee use of the company name and logo is overbroad. See, e.g., *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015) (finding restriction on employee use of employer's logo unlawful). We would, however, set aside the election even absent this finding.

Finally, we agree with the hearing officer that maintenance of these work rules, including the confidentiality rule our colleague agrees is overbroad, could reasonably have affected the outcome of the election. The rules are applicable to all unit employees; in fact, the Employer requires employees to sign forms acknowledging that they received the handbook and certifying that they agree to follow the rules. Further, the handbook states that the Employer will impose discipline when necessary to assure compliance with the rules. In these circumstances, we find that the rules could reasonably have dampened employee activity preceding the election.

We find no merit in our dissenting colleague's argument that setting aside the election is unwarranted. First, we disagree with our colleague that the impact of the overbroad confidentiality rule was mitigated by the Petitioner's possession of the *Excelsior* list for a significant portion of the critical period. Rather, by its terms, the scope of the confidentiality rule far exceeds the information contained in the *Excelsior* list, and the Petitioner's possession of that list does not necessarily diminish the likelihood that employees may have been unwilling to share employee or related information among themselves. Second, for reasons stated above, we reject our colleague's reliance on employees' purported lack of access to the Employer's email system. Third, contrary to our colleague's view, the lack of evidence that employee activity actually was chilled by the name/logo rule is irrelevant. See *Jurys Boston Hotel*, 356 NLRB No. 114, slip op. at 3 (2011). Last, we are not persuaded by our colleague's emphasis on the election margin, which reasonably might have been attributable *to* the coercive impact of the Employer's rules. See *Freund Baking Co.*, 336 NLRB 847, 847 fn. 5 (2001) (emphasizing that whether an election should be set aside does not turn on the results, but on analysis of the nature and circumstances of the alleged objectionable conduct).

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Bakers Union Local 125, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of

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Because we order a second election, we find it unnecessary to pass on the Petitioner's arguments that the challenged rules are overbroad for reasons beyond those stated by the hearing officer.

voters and their addresses that may be used to communicate with them.[2] *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C., February 17, 2016.

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Mark Gaston Pearce, Chairman

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

My colleagues find that the Employer maintained three objectionable work rules concerning nondisclosure of employee lists, restrictions on computer use, and restrictions on use

[2] We reject the Petitioner's contention that the second election should be conducted with the modifications to the *Excelsior* list included in the Board's election rule changes (Representation – Case Procedures, 79 Fed. Reg. 74,308 (Dec. 15, 2014)). The revisions to the election rules apply only in cases in which the petitions were filed on or after the effective date of the final rule, April 14, 2015. See General Counsel Memo GC 15-06 (April 6, 2015). Cases such as this, where the petition was filed before April 14, 2015, will continue to be processed under the rules in effect before that date. Id.

of the Employer's name. Even if these three rules are objectionable (which I find unnecessary to reach as to two of the rules),[3] I believe the Board should still uphold the results of the election.[4]

Mere maintenance of overbroad work rules does not necessarily require that an election be set aside. *Safeway, Inc.*, 338 NLRB 525, 526 (2002). The Board will set aside an election where the maintenance of overbroad work rules "'could . . . reasonably have affected the results of the election.'" *Jurys Boston Hotel*, 356 NLRB No. 114, slip op. at 2 (2011) (quoting *Safeway*, supra). I would find the maintenance of these three rules could not have reasonably affected the election results. The rule against disclosing employee lists could not have reasonably affected the outcome of the election because, consistent with the Board's election procedures, the Union

[3] I agree that the portion of the Employer's confidentiality rule requiring nondisclosure of "anything relating to" employee lists is objectionable because the rule arguably prohibits employees from mentioning the name(s) of other employees, which is a central aspect of many kinds of Section 7 activity, and I believe there is insufficient evidence of any reasonable justification for such a restriction. However, I believe an employer may require confidentiality of a variety of documents, including those that list or otherwise pertain to employees and/or contain other confidential or sensitive business information, as to which nondisclosure may be warranted by legitimate business justifications.

Although I do not reach whether the rule restricting computer use is objectionable, my colleagues find the rule objectionable as applied to employees' use of the Employer's email system in reliance on *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), in which a Board majority, overruling in relevant part *Register Guard*, 351 NLRB 1110 (2007), held that, if employees have been granted access to their employer's email system for work-related purposes, they are rebuttably presumed to have a right to use that system to engage in NLRA-protected communications on nonworking time. I dissented from the majority's decision in *Purple Communications*, see id., slip op. at 18–28, but even applying that decision here, the record appears insufficient to support the objection. The Employer's rule lists "email" along with several other resources and states that "[o]ccasional use of these resources by our employees during non-work hours is permitted." However, this language does not establish that any unit employees in fact have access to the Employer's email system, and the Employer merely stipulated that some unit employees have access to the Employer's internet and intranet for work-related purposes.

[4] I disagree, however, with my colleagues finding that the Employer's restriction on the use of its logo is objectionable. I believe the Employer has a legitimate and substantial interest in protecting its logo that outweighs any potential adverse impact its rule might have on employees' Sec. 7 rights.

was given an accurate *Excelsior* list (setting forth all bargaining-unit employees' names and certain contact information) at least 22 days prior to the election, mitigating any possible adverse effects caused by the rule. The computer-use rule as applied to employees' use of the Employer's email system could not have reasonably affected the outcome of the election because there is no evidence that any unit employees even had access to the Employer's email system. Finally, the Union lost the election by a substantial margin—18 employees voted in favor of representation, 50 against—there is no evidence that any unit employees were chilled in expressing their union views during the critical pre-election period by the rule against use of the Employer's name, and I find it inherently improbable that this rule could have chilled protected expression to such an extent as to account for so lopsided a result. Accordingly, I believe the mere maintenance of this rule could not reasonably have affected the results of the election.[5]

For these reasons, I respectfully dissent.

Dated, Washington, D.C., February 17, 2016.

Philip A. Miscimarra, Member

[5] *Freund Baking Co.*, 336 NLRB 847 (2001), on which the hearing officer relied, is distinguishable from this case. The confidentiality rule in *Freund Baking* was much broader than the confidentiality rule in this case. See id. at 847 (finding that "employees could reasonably construe [the confidentiality rule in that case] as precluding them from discussing their wages, hours, and other terms and conditions of employment with other employees, as well as with individuals outside of the company"). Here, by contrast, the objectionable aspect of the confidentiality rule was limited to disclosure of employee lists, and the Union had an accurate *Excelsior* list well in advance of the election. Accordingly, *Freund Baking* does not require that the election be set aside in this case.